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**State of Washington  
GROWTH MANAGEMENT HEARINGS BOARD  
FOR EASTERN WASHINGTON**

LARSON BEACH NEIGHBORS and JEANIE  
WAGENMAN,

Petitioner(s),

v.

STEVENS COUNTY,

Respondent(s).

Case No. 07-1-0013

**FIRST ORDER ON COMPLIANCE**

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**I. SYNOPSIS**

On February 2, 2009, the County enacted Ordinance No. 3-2009 in response to a finding of non-compliance by the Eastern Washington Growth Management Hearings Board (Board). The Board's finding of non-compliance was limited to two provisions of the Stevens County Code (SCC), SCC 3.11 and SCC 3.16, and was further limited to the consideration of two development-related impacts – impervious surface coverage and storm water discharge – both in relationship to critical area protection.

Petitioners Larson Beach Neighbors and Jeanie Wagenman (collectively, Petitioners) objected to a finding of compliance asserting Stevens County failed to afford adequate public participation during the adoption process and also failed to amend the referenced code provisions with specific limitations, methods of review, or design standards to reduce the impacts to critical areas.

With this Compliance Order, the Board finds and concludes the County provided public participation which was appropriate and effective under the circumstances of these compliance proceedings.

1 The Board finds and concludes with the amendatory language, the County is giving  
2 consideration to the effects of impervious surface coverage and storm water discharge on  
3 critical areas within rural areas, a consideration which has not previously been afforded. In  
4 addition, the Board also finds and concludes with the amendatory language, the County is  
5 requiring lot designs for both subdivisions and short subdivisions to minimize the effects of  
6 impervious surfaces on critical areas within rural areas.

7 However, the Growth Management Act (GMA) does not require that impacts to  
8 critical areas be minimized; the GMA requires the functions and values of critical areas be  
9 protected. Also, the Board's Final Decision and Order (FDO) did not limit impervious surface  
10 consideration to just the rural areas but sought consideration county wide. In these  
11 regards, the County failed to fully implement the Board's October 2008 Final Decision and  
12 Order and comply with the GMA.

13 Therefore, with this Compliance Order, the matter is remanded to the County to take  
14 the necessary legislative actions to bring itself in compliance with the GMA.

## 14 II. PROCEDURAL HISTORY

15 On October 6, 2008, the Board issued its Final Decision and Order (FDO) in this  
16 matter. With this FDO, the Board concluded that while the Petitioners abandoned certain  
17 issues, did not exhaust administrative remedies in regards to claims based on the State  
18 Environmental Policy Act, RCW 43.21c (SEPA), and failed to carry the burden of proof for  
19 several issues,<sup>1</sup> the Petitioners did demonstrate, in part, Stevens County was not protecting  
20 critical areas as required by the GMA pursuant to RCW 36.70A.060, .172, .020(9), and  
21 .020(10). This lack of protection was based on the County's failure to enact design standard  
22 regulations, specifically those set forth in Stevens County Code (SCC) 3.11 and 3.16, to  
23 protect all of the functions and values of critical areas.<sup>2</sup> The Board ordered the County to

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25 <sup>1</sup> FDO, at 60-65, Findings of Fact and Conclusions of Law.

26 <sup>2</sup> FDO, at 41-53.

1 take legislative action to bring itself into compliance with the GMA no later than February 3,  
2 2009.<sup>3</sup>

3 On February 2, 2009, the County took legislative action with the adoption of  
4 Ordinance No. 3-2009.

5 On February 17, 2009, the Board received Stevens County's Statement of Actions  
6 Taken to Comply (SATC) and Remand Index.

7 On March 3, 2009, the Board received Petitioners' Response to the County's SATC  
8 and Petitioners' Motion to Supplement.

9 On March 17, 2009, the Board received Stevens County's Compliance Brief and an  
10 objection to the Petitioners' Motion to Supplement.

11 On March 18, 2009, the Board issued its Order on Motions, denying Petitioners'  
12 Motion to Supplement and ordering the Petitioners to provide a brief which redacted all  
13 references and arguments to the denied exhibits.

14 On March 23, 2009, the Board received Petitioners' Redacted Response to the  
15 County's SATC.

16 On March 26, 2009, the Board received Petitioners' Reply Brief.<sup>4</sup>

17 On March 31, 2009, the Board held a telephonic Compliance Hearing. Board  
18 Members Joyce Mulliken, John Roskelley, and Ray Paoella attended, Board Member  
19 Mulliken presiding. Petitioners were represented by Jeanie Wagenman. Stevens County was  
20 represented by Peter Scott with Planning Director Clay White also in attendance.

### 21 **III. BURDEN OF PROOF AND STANDARD OF REVIEW**

22 Except when a jurisdiction is subject to a determination of invalidity, the burden  
23 remains on the Petitioners to demonstrate that any action taken by the jurisdiction in  
24 response to a Board's order finding non-compliance does not comply with the Act.<sup>5</sup> The

25 <sup>3</sup> October 6, 2008 FDO at 66.

26 <sup>4</sup> Pursuant to the Board's FDO, Petitioners' optional reply brief was due March 24, 2009. Because Petitioners  
were required to file a Redacted Response Brief, the Board granted the Petitioners two additional days for  
filing of a Reply Brief. See Order on Petitioners' Motion to Supplement, at 5 (March 18, 2009).

<sup>5</sup> RCW 36.70A.320(2), .320(4).

1 GMA requires the Board find compliance unless it determines the action taken by the  
2 jurisdiction is clearly erroneous in view of the entire record before the Board and in light of  
3 the goals and requirements of the GMA.<sup>6</sup> Thus, to meet this burden, Petitioners' legal and  
4 factual arguments must leave the Board with "a firm and definite conviction that a mistake  
5 has been committed."<sup>7</sup>

6 In addition, not only does the GMA continue to afford a presumption of validity to  
7 the adoption of comprehensive plans and development regulations during compliance  
8 proceedings,<sup>8</sup> RCW 36.70A.3201 requires the Board give deference to a county's choices in  
9 GMA compliance. However, as the Washington State Supreme Court has clarified:<sup>9</sup>

10 [L]ocal discretion is bounded, however, by the goals and requirements of the  
11 GMA.

12 The Court has further stated:<sup>10</sup>

13 The amount [of deference] is neither unlimited nor does it approximate a  
14 rubber stamp. It requires the Board to give the [jurisdiction's] actions a  
15 "critical review" and is a "more intense standard of review" than the arbitrary  
16 and capricious standard.

17 And, it has also been recognized that:<sup>11</sup>

18 [C]onsistent with *King County*, and notwithstanding the 'deference' language  
19 of RCW 36.70A.3201, the Board acts properly when it foregoes deference to a  
20 . . . plan that is not 'consistent with the requirements and goals of the GMA.

21 With these parameters in mind, the Board reviews this matter.

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22 <sup>6</sup> RCW 36.70A.320(3), .330.

23 <sup>7</sup> *Swinomish Indian Tribal Community, et al. v Western Washington Growth Management Hearings Board*, 161  
24 Wn.2d 415, 423-24, 166 P.3d 1198 (2007).

25 <sup>8</sup> RCW 36.70A.320(1)

26 <sup>9</sup> *King County v. Central Puget Sound Growth Management Hearings Board*, 142 Wn.2d 543, 561, 14 P.2d 133  
(2000).

<sup>10</sup> *Swinomish*, at 435, fn. 8 (internal citations omitted).

<sup>11</sup> *Thurston County v. Cooper Point Association*, 108 Wn. App. 429, 444, 31 P.3d 28 (2001).

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**IV. PRELIMINARY MATTERS**

Before addressing the merits of this case, there are several preliminary matters that need to be addressed by the Board.

1. The Record

As noted *supra*, on March 3, 2009, Petitioners moved to supplement the Record; a motion which was denied by the Board on March 18, 2009.<sup>12</sup> In relationship to this motion and raised not only during argument at the compliance hearings but also in the parties' responsive briefing, was correspondence received on February 6, 2009, from the Department of Community, Trade, and Economic Development (CTED) and shown on the County's Index of the Record as Index No. 25. Petitioners, relying on this correspondence, allege the County was permitting comments to be received after the close of the comment period from some while excluding submittal by others, effectively creating a double standard and precluding public response to CTED's correspondence.<sup>13</sup> At the compliance hearing, Stevens County contended this correspondence was not part of the Record.

Despite a comprehensive discussion of the Record within the Board's FDO for this matter,<sup>14</sup> it is apparent that what is and is not the Record is still confusing for the parties. Thus, once again, the Index of the Record reflects the documents utilized by the County during the decision-making process and are those documents from which the parties may draw exhibits without question to support their arguments. The Record for these proceedings includes all of the documents contained within the County's Index of Record filed with the Board on February 17, 2009. Thus, despite the County's assertion to the contrary – Index No. 25 is part of the Record.

Index No. 25 is a congratulatory letter from CTED received February 6, 2009, *four days after the County adoption Ordinance No. 3-2009*. Thus, it was not possible for the County to have considered the contents of this letter during its deliberations on what

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<sup>12</sup> March 18, 2009 Order on Petitioners' Motion to Supplement, at 4.  
<sup>13</sup> Petitioners' Reply, at 1-2.  
<sup>14</sup> October 6, 2008 FDO, at 8.

1 actions it would take in response to the Board's October 2008 FDO. Index No. 25 is simply a  
2 post-adoption procedural component of the Record. These types of documents, such as a  
3 Notice of Adoption published in the official newspaper, are important parts of the Record  
4 although they were not *per se* considered by the County during the adoption process.  
5 Petitioners' assertions the County was allowing comments after the close of public comment  
6 period and precluding public response to the CTED letter *prior* to enacting Ordinance 3-  
7 2009, are therefore not supported by the Record.

8 2. Exhibits

9 In addition to clarifying the Record of this proceeding, the Board finds it necessary to  
10 also denote the distinction between the Record and the Exhibits. From the Record, parties  
11 draw the documents they are relying on to support their argument and attached these  
12 documents as exhibits to their briefs. Simply citing to a document listed in the Index of the  
13 Record does not bring the document into evidence before the Board. Nor does making  
14 general reference to documents previously filed with the Board. It is not the Board's job to  
15 locate the documents that support an argument being presented by a party. WAC 242-02-  
16 52001(1) specifically states: (Emphasis added)

17 [T]he evidence in a case shall consist of the exhibits cited in the briefs *and*  
18 *attached thereto*.

19 The parties are reminded that all exhibits are to be attached to their briefs, tabbed, and  
20 presented with a table of the exhibits for reference. Without this, the arguments set forth in  
21 a brief are left unsupported.

22 3. Redacted Compliance Brief

23 With the March 2009 Order on Petitioners' Motion to Supplement, the Board ordered  
24 the Petitioner to submit a redacted brief which removed all references to and all arguments  
25 relying on the exhibits for which supplementation was denied.<sup>15</sup> Petitioners' submitted their  
26 redacted brief; however, the Board notes reference to notice on the County's website and

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<sup>15</sup> March 18, 2009 Order, at 4.

1 Ecology's comments are still contained within the redacted brief. Stevens County renewed  
2 its objections in this regard at the Compliance Hearing.

3 As noted in the Board's Order, all reference to the denied exhibits was to be stricken  
4 and, with the Petitioners failing in this regard, the Board reiterates the denial of  
5 supplementation and will disregard any argument relying on these documents.

### 6 **V. DISCUSSION OF COMPLIANCE ISSUES**

7 On October 8, 2008, the Board determined Petitioners had demonstrated Stevens  
8 County's Title 3 Development Regulations, specifically design standards set forth in SCC  
9 3.11 and SCC 3.16, failed to comply with the GMA. The Board stated:<sup>16</sup>

10 Although the Petitioners' challenge is to the County's adoption of Title3  
11 Development Regulations, which are not the primary regulatory mechanism by  
12 which the County is protecting the functions and values of the five mandatory  
13 categories of critical areas, [Title 3] serves an ancillary purpose by further  
14 amplifying the protections of the CAO. The Petitioners have set forth specific  
15 argument as to storm water control and impervious coverage and the Board  
16 sees the consideration of these development related impacts as minor  
17 modifications Steven County can easily remedy upon remand. The maximum  
18 permissible impervious coverage and the methods for addressing storm water  
19 controls are at the County's discretion.

20 Based on this conclusion, the Board remanded SCC 3.11 and SCC 3.16, ordering:<sup>17</sup>

21 [The County] to take legislative action in regards to impervious surface  
22 coverage throughout the County and the consideration of storm water  
23 discharge within the rural area.

24 On February 2, 2009, Stevens County enacted Ordinance No. 3-2009 (Ordinance) in  
25 response to the Board's October 6, 2008 FDO. With this enactment, the County added three  
26 new sections to its development regulations, Title 3. Specifically, Stevens County added the  
following sections:

SCC 3.11.230 Design Standards – A, F, RA-5, RA-10, RA-20, AR-10 zones, and  
RC, CR, and SR overlay areas.

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25 <sup>16</sup> FDO, at 53

26 <sup>17</sup> FDO, at 61

1  
2 Any subdivision<sup>18</sup> in the Agricultural, Forest, Rural Area zones, and RC, CR,  
3 and SR overlay areas shall provide or demonstrate that the following  
4 requirements are met:

5 ...  
6 (H) When critical areas are present, ensure that lot design minimizes the  
7 effect of impervious surfaces<sup>19</sup> and stormwater runoff on critical areas<sup>20</sup>  
8 consistent with SCC Title 13 and SCC 3.80

9 SCC 3.11.232 Design Standards – A, F, RA-5, RA-10, RA-20 and AR-10, and  
10 the RC, CR, and SR overlay areas.

11 Any Short Subdivision<sup>21</sup> in the Agricultural, Forest, RA-5, AR-10,<sup>22</sup> R-10 acre,  
12 and AR-10 zones, and the RC, CR, and SR overlay areas shall provide the  
13 following:

14 ...  
15 (H) When critical areas are present, ensure that lot design minimizes the  
16 effect of impervious surfaces and storm water runoff on critical areas  
17 consistent with SCC Title 13 and SCC 3.80.

18 SCC 3.20.035 Preliminary Subdivisions and Short Subdivisions

19 <sup>18</sup> SCC, Chapter 3.90 defines a subdivision as: The division or re-division of land into five or more lots for the purpose of sale, lease or transfer of ownership.

20 <sup>19</sup> SCC, Chapter 3.90 defines impervious surface as: A hard surface area which causes water to run off the surface in greater quantities or at an increased rate of flow from the flow present under natural conditions prior to development. Common impervious surfaces include but are not limited to roof tops, walkways, patios, driveways, parking lots or storage areas, concrete or asphalt paving, or other surfaces which similarly impeded the natural infiltration of storm water. Open, uncovered retention/detention facilities shall not be considered as impervious surfaces.

21 <sup>20</sup> SCC Title 3 does not explicitly define critical areas, storm water, or storm water discharge. For critical areas, SCC Title 13 addressed the five mandatory categories of critical areas as set forth in the GMA, RCW 36.70A.030(5) – Critical Aquifer Recharge Areas, Fish and Wildlife Habitat Conservation Areas, Frequently Flooded Areas, Geologically Hazardous Areas, and Wetlands – and therefore the Board deems these areas as the critical areas referenced in Title 3. For storm water and/or storm water discharge, the Board utilizes the common meaning of the terms – storm water is water coming from rain or snow that runs off of surfaces such as rooftops, paved streets, and parking lots and storm water discharge is the release of storm water into an area.

22 <sup>21</sup> SCC, Chapter 3.90 defines a short division as: The division or re-division of land into four or fewer lots, tracts, parcels, sites or subdivision for the purpose of sale, lease or transfer or ownership.

<sup>22</sup> The Board notes that reference to the “AR-10” zone must be a typo, with the correct zone being RA-10.

1 A. The County will consider the following criteria in reviewing applications for  
2 preliminary subdivisions and short subdivisions, and may only grant  
preliminary approval if the applicant demonstrates all of the criteria are met:

3 ...  
4 (4) Lots within the subdivision/short subdivision have been designed to  
5 minimize potential impact to critical areas resulting from storm water  
6 discharge and impervious surfaces. Where required, potential environmental  
impacts resulting from storm water discharge and impervious surfaces have  
been properly mitigated pursuant to SCC Title 13 and SCC 3.80.

7 Therefore, the issue to be addressed in this compliance proceeding is based on the issues  
8 for which the Board found Stevens County non-compliant in the October 2008 FDO.  
9 Namely, does SCC Chapter 3.11 and Chapter 3.16 provide for design standards which  
10 protect the functions and values of critical areas in Stevens County as required by the GMA  
11 from the effects of storm water discharge and impervious coverage?

### 12 **Public Participation**<sup>23</sup>

#### 13 **The Parties' Position:**

##### 14 **Petitioners LBN and Jeanie Wagenman:**

15 Petitioners assert the County failed to comply with the public participation  
16 requirements of the GMA and Stevens County's Title 3 by "fast tracking" the Ordinance with  
17 little public input or opportunity.<sup>24</sup> Petitioners contend the County published only one  
18 notice of the public hearing in the *Chewelah Independent*, provided for an inconspicuous  
19 posting on the County's Land Services webpage, and held just one public hearing before the  
20 Board of County Commissioners (BOCC) prior to adopting Ordinance 3-2009.<sup>25</sup> According to  
21 Petitioners, the County gave no other notice (i.e. press releases, individualized mailings) nor  
did it hold any other public meetings or hearings (i.e. before the Planning Commission)

22 \_\_\_\_\_  
23 <sup>23</sup> Although technically a new issue in these compliance proceedings, Petitioners allegations that the County  
24 failed to provide adequate public participation when taking legislative action in response to the Board's finding  
of non-compliance is appropriately addressed during the compliance proceedings. To require the Petitioner to  
file a new PFR on this single issue would simply be inefficient and redundant.

25 <sup>24</sup> Petitioners' Redacted Response Brief, at 2-5, Citing SCC 3.30.080, 3.30.10(C), 3.30.125, 3.31.040, 3.31.050,  
3.31.070, RCW 36.70A.035, .130, and WAC 365-195-600.

26 <sup>25</sup> Petitioners' Redacted Response Brief, at 2-3.

1 which would have provided the broad outreach for public comment required by the GMA  
2 and SCC.<sup>26</sup>

3 Petitioners further assert the County improperly classified the Ordinance as an  
4 emergency pursuant to SCC 3.31.070 and should have complied with the Type 5 proposal  
5 procedures set forth in SCC 3.30 and 3.31 which require more notice and public  
6 meetings/hearings.<sup>27</sup>

7 **Respondent Stevens County:**

8 Stevens County argues Petitioners cite to provisions from the WAC and other County  
9 Codes which do not pertain to the public process the County has established for responding  
10 to an order of the Board.<sup>28</sup> The County states that SCC 3.310.070 sets forth the necessary  
11 procedures, which it followed, and the Board has previously held this provision was  
adequate.<sup>29</sup>

12 **Petitioners Reply:**

13 In reply, Petitioners reiterate the GMA's requirement for early and continuous public  
14 participation and allege Stevens County's declaration of emergency failed to provide  
15 adequate opportunity for county residents to participate in the process. Petitioners assert  
16 neither RCW 36.70A.130(2)(b) or the prior case cited by the County are relevant to the  
17 instant matter as those relate to comprehensive plan amendments and not development  
18 regulations.<sup>30</sup> Petitioners also reiterate the inadequacy of the public notice and public  
meetings/hearings in relationship to the Ordinance.<sup>31</sup>

19 **Board Analysis:**

20 As Petitioners note, public participation is a keystone of GMA planning and the Board  
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22  
23 <sup>26</sup> *Id.*

<sup>27</sup> *Id.* At 3-4.

<sup>28</sup> Stevens County Response Brief, at 4.

<sup>29</sup> Stevens County Response Brief, at 4 (citing to *Wagenman, et al v. Stevens County*, Case No. 06-1-0009c, Order on Compliance (May 22, 2008)).

<sup>30</sup> Petitioners' Reply Brief, at 4-6.

<sup>31</sup> Petitioners' Reply Brief, at 5-6.

1 has articulated this in many of its holdings.<sup>32</sup> The courts have also recognized the extensive  
2 public participation scheme set forth in the GMA;<sup>33</sup> a scheme established by various  
3 provisions of the GMA including RCW 36.70A.020(11), 36.70A.035, and 36.70A.140.  
4 Compliance proceedings do not eliminate these requirements; public participation is just as  
5 important when a jurisdiction is responding to an order of the Board as it is during the initial  
6 adoption of an ordinance or resolution.

7 However, RCW 36.70A.140 does allow for a deviation from the standard public  
8 participation program so long as the jurisdiction provides public participation that is  
9 *appropriate and effective under the circumstances* when responding to a Board decision  
10 related to invalidity.<sup>34</sup> Stevens County's regulation, SCC 3.31.040(G), similarly provides for  
11 such deviation and includes a finding of non-compliance as well as a determination of  
12 invalidity. Furthermore, RCW 36.70A.140 provide that errors in exact compliance with a  
13 jurisdiction's procedures will not invalidate the action if the *spirit of the program and  
procedures is observed*.

14 Stevens County's Public Participation Program classifies GMA Legislative Enactments  
15 as a "Type 5" decision<sup>35</sup> and sets forth procedures for adoption of these types of decisions  
16 in both SCC 3.30 and SCC 3.31. When adopting Ordinance No. 3-2009, the County utilized  
17 the provisions of SCC 3.31.070. SCC 3.31.070 is entitled "Adoption of Type 5 Proposal as an  
18 Emergency Action" and permits the BOCC to adopt a Type 5 proposal as an "emergency  
19 action under RCW 36.70A.130(2)(b) or 36.70A.390." Use of this provision as a basis for  
20 adoption is clearly stated in the "Whereas" section of the Ordinance:<sup>36</sup>

21 Stevens County utilized the public participation process in SCC 3.31.070 to:

22 <sup>32</sup> See e.g., *Citizens for Good Governance, et al v. Walla Walla County*, Case No. 05-1-0013, FDO (June 15,  
23 2006)(Holding that public participation is "heart and soul of GMA"); *Roberts/Taylor v. Benton County*, Case  
24 No. 05-1-0003, FDO (Sept. 20, 2005)(Public participation is "very heart of GMA"); *Wilma, et al v. Stevens  
County*, Case No. 99-1-0001c, FDO (May 21, 1999)(Public participation is "very core of GMA").

25 <sup>33</sup> See e.g., *1000 Friends of Wash. v. McFarland*, 159 Wn.2d 165 (2006)

26 <sup>34</sup> RCW 36.70A.140 references both comprehensive plans and development regulations but is limited to a  
determination of invalidity.

<sup>35</sup> SCC 3.30.035 and 3.30.080 defines Type 5 decisions to include land use code text amendments.

<sup>36</sup> Ordinance No. 3-2009, Whereas No. 9

1 respond to the Hearings Board Final Decision and Order. Pursuant to SCC  
2 3.31.070(E), this process was utilized because of the limited amount of time  
3 given to respond to a FDO issued by the Growth Management Hearings Board;

4 In addition, the Ordinance further states:<sup>37</sup>

5 The public participation process utilized to evaluate these changes met the  
6 requirements of SCC 3.31.070;

7 At the compliance hearing, Stevens County stated no emergency had been declared - a  
8 confusing statement given the fact the Ordinance not only explicitly states it was being  
9 adopted based on a provision of the SCC which relates to emergency actions but also  
10 specifically set forth a statement of need.<sup>38</sup> Thus, the Board can only conclude the adoption  
11 of the Ordinance was deemed an emergency.

12 Although the Board will grant deference to a jurisdiction's interpretation of its own  
13 code provisions, SCC 3.31.070 has limited application – those proposals based on RCW  
14 36.70A.130(2)(b) or 36.70A.390.<sup>39</sup> RCW 36.70A.130(2)(b) permits the amendment of a  
15 comprehensive plan, after appropriate public participation, outside of the annual  
16 amendment limitation, it does not address development regulations, such as Title 3. RCW  
17 36.70A.390 pertains to moratoria or interim regulations, neither of which are present in this  
18 case. Thus, the procedures of SCC 3.31.070 were not the proper avenue for amending  
19 SCC Title 3.

20 However, as noted above, the County's GMA Public Participation Process provisions,  
21 at SCC 3.31.040(G) provide: (Emphasis added)

22 Notwithstanding the foregoing, *in adopting legislation in response to a Growth*  
23 *Management Hearings Board decision* declaring part of all of a Comprehensive  
24 Plan or *development regulation* invalid or *out of compliance* with RCW 36.70A,  
25 the County will provide for such *public participation as is appropriate and*  
26 *effective under the circumstances* presented by the hearing board's order.

<sup>37</sup> Ordinance No. 3-2009, Whereas No. 15

<sup>38</sup> Ordinance No .03-2009, Whereas No. 9 "... this process was utilized because of the limited amount of time given to respond to a FDO ..." SCC 3.31.070(E) requires a statement of need.

<sup>39</sup> SCC 3.31.070(A)

1  
 2 Therefore, the County has provided for deviation from established public participation  
 3 procedures in response to a Board's finding of non-compliance in regards to a development  
 4 regulation. But, this deviation is not limitless in that public participation must still be  
 5 *appropriate and effective under the circumstances*. Thus, the question for the Board is  
 6 whether the public participation provided by Stevens County during the adoption of  
 7 Ordinance 3-2009 was appropriate and effective under the circumstances. Assistance in  
 8 resolving this question can be based not only on the County's established public  
 9 participation process but on the scope of the remand and the necessary corrective action.

10 SCC 3.31 specifically addresses Type 5 decisions and, in SCC 3.31.040, establishes  
 11 the GMA Public Participation process which is continued with SCC 3.31.050 Planning  
 12 Commission Consideration and SCC 3.31.060 BOCC Consideration. These three provisions  
 13 essentially provide for the following in regards to public participation:

Code Citation	Code Provision	County Action
3.31.040(A)	LUSD promotes public participation	LUSD published notice in paper, website, and mailed to agencies/interested parties <sup>40</sup>
3.31.040(B)	LUSD considers 1 public meeting in each Commissioner district	None
3.31.040(E)	LUSD posts proposal on website and provides means for accepting e-mails	Notice was posted and clearly stated that public comments on the proposed changes could be sent via mail or e-mail, providing addresses for both, until the close of the public comment portion of the hearing <sup>41</sup>
3.31.040(F)	LUSD provides Planning Commission w/ written	None

24 <sup>40</sup> Index of the Record, Exhibits 2 and 4 – Letter to Agencies/Parties and affidavit, Exhibits 3 and 11 –  
 25 Newspaper Publication and affidavit; Respondent's Exhibits; Petitioners' Exhibits. The exact date of posting on  
 26 the website is not known.

<sup>41</sup> Petitioners' Redacted Brief, at 3; Index of the Record, Exhibit 2 (Notice)

	summary of comments	
3.31.050(A)	LUSD conducts environmental review	Notice of Adoption of Environmental Documents on Jan. 6, 2009 <sup>42</sup>
3.31.050(A)	LUSD prepares recommendation for Planning Commission	None
3.31.050(B)	Public hearing before Planning Commission	None
3.31.050(F)	Planning Commission transmits recommendation for BOCC	None
3.31.060(A)	LUSD schedules study session w/ BOCC	None; LUSD did prepare a summary of comments and a Staff Report w/ recommendation for the BOCC <sup>43</sup>
3.31.060(B) – public meeting 3.31.060(C) – public hearing	BOCC holds (a) public meeting or (b) public hearing	January 20, 2009 public hearing. <sup>44</sup> The hearing allowed for public comment – oral and written – and three members of the public, including Petitioner Wagenman, attended
3.31.060(B) 3.31.060(F)	BOCC takes action	February 2, 2009 Ordinance 3-2009 is enacted

What appears to be missing from the County's process in this matter is, as Petitioners note, activity before the Planning Commission. Stevens County does not dispute, and in fact the Record supports, Petitioners' statements the County provided no public meeting within Commissioner's districts and no public hearing before the Planning Commission.<sup>45</sup> But, SCC 3.31.040(B) requires only the *consideration* of a public meeting in each Commissioner district and therefore the County's action in omitting this opportunity for public comment did not violate the County's public participation process.<sup>46</sup> SCC 3.31.050

<sup>42</sup> Index of the Record, Exhibits 9 and 10 – SEPA adoption

<sup>43</sup> Index of the Record, Exhibit 15 – Staff Report; Respondent's Exhibits

<sup>44</sup> Ordinance 3-2009, Whereas section

<sup>45</sup> Petitioners' Redacted Response Brief, at 2-5; Petitioners' Reply Brief, at 4-6; County's Index of the Record, County's Exhibit CT3-2.

<sup>46</sup> Although the Record does not demonstrate that the County actually considered holding public meetings, the burden is on the Petitioners to demonstrate that the County, in fact, failed to comply with SCC 3.31.040(B). The Petitioners presented no evidence to support such an allegation of non-compliance.

1 does require a public hearing before the Planning Commission. Although the County's failure  
2 to provide for a hearing before the Planning Commission would have been clear error  
3 during the normal comprehensive plan or development regulation adoption process, the  
4 County is permitted to deviate from this process so long as the public participation afforded  
5 is appropriate and effective when responding to an order of the Board. Under the  
6 circumstances and given the history of this matter and the scope of the remand – "minor  
7 modifications Stevens County can easily remedy"<sup>47</sup> - the Board fails to see how conducting  
8 a hearing before the Planning Commission would have encouraged greater public  
9 participation in this case or that a recommendation from the Planning Commission would  
10 have aided the BOCC's decision-making process.<sup>48</sup> Therefore, the Board finds no basis for  
remanding Ordinance No. 3-2009 because of this omission.

11 The County also does not dispute the manner in which it provided notice of the  
12 public hearing before the BOCC – mailing, website posting, and publication. Petitioners  
13 contend these notices were not sufficient because the County should have had published  
14 notice twice in the *Chewelah Independent*,<sup>49</sup> should have issued press releases,<sup>50</sup> should  
15 have provided a more conspicuous notice on the website, and should have mailed notice to  
16 more interested parties.<sup>51</sup> However, the methods used by the County are accepted as being  
17 reasonably calculated to provide effective notice under both the GMA and Steven County's  
18 own codes.<sup>52</sup>

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19 <sup>47</sup> FDO, at 53 The Board also noted, at Page 50, that addressing design standards "is a nominal and easily  
20 accomplished amendment."

21 <sup>48</sup> As with the public meeting, Petitioners' fail to submit evidence why, under the circumstances, a hearing  
22 before the Planning Commission would have furthered or facilitated additional participation by the public or  
23 provided the BOCC with more information from which to derive their decision. Petitioners simply assert there  
24 was no hearing and that SCC 3.31 requires a hearing; but, Petitioners do not articulate why this step would  
25 have been needed during the compliance proceedings and the omission resulted in a process that was not  
26 appropriate and effective.

<sup>49</sup> Based on SCC 3.30.120(C)(2) which states that publication should occur once a week for two consecutive  
weeks

<sup>50</sup> Based on SCC 3.30.120(C)(5)

<sup>51</sup> Based on SCC 3.30.120(C)(5)

<sup>52</sup> RCW 36.70A.035 lists acceptable methods to provide notice. SCC 3.30.120C provides the five manners in  
which notice shall be made to the public – mailing to property owners within 300 feet of subject property,

1 Although SCC 3.30.120(C)(2) does state that publication should occur in the official  
2 county newspaper for two consecutive weeks, SCC 3.30.125 does not require any  
3 publication for Type 5 Land Use Code Text Amendments. In addition, as to Petitioners'  
4 allegation the County failed to notify other interested parties, such as Mr. Jim Davies, not  
5 only do Petitioners lack standing to raise a claim on behalf of Mr. Davies, but he did  
6 comment of the proposed ordinance and attended the January 20, public hearing, so  
7 suffered no harm.<sup>53</sup> In addition, it has previously been determined that generalized notice,  
8 such as newspaper publication and website posting, are appropriate for legislative  
9 enactments and the GMA does not require individualized notice, it only requires reasonable  
10 notice.<sup>54</sup> Given the language of SCC 3.31.040(G), in conjunction with the notice provisions  
11 of SCC 3.30.120 and 3.30.125 and RCW 36.70A.035, the Board finds Stevens County gave  
12 reasonable and adequate notice of the January 20, 2009 Public Hearing.

12 **Conclusion:**

13 The Board finds and concludes Petitioners failed to demonstrate the public  
14 participation afforded by Stevens County for the adoption of Ordinance No. 3-2009 in  
15 response to the Board's October 2008 FDO was not appropriate and effective under the  
16 circumstances. Given the language of both RCW 36.70A.140 and SCC 3.31.040(G), which  
17 allows for deviation from the standard public participation program when responding to a  
18 Board's Order, the Board concludes Stevens County provided adequate public participation

19  
20 publication in the official county newspaper on two consecutive weeks, posting of the property, posing on the  
21 Land Services Department's website, or other methods of notice such as press releases or notice to interested  
22 community groups. SCC 3.30.120C requires that "one or more" of the methods be utilized. SCC 3.30.125  
23 establishes which methods shall be used for each decision type. For a Type 5 decision regarding a text  
24 amendment to a land use code provision, the County is to (1) mail notice, (2) post notice on the County's  
25 website, and (3) provide other means of notice.

26 <sup>53</sup> Index of the Record, Exhibit 17 – Comments from Davies; Statement of Petitioner Wagenman at Compliance  
Hearing.

<sup>54</sup> *Chevron USA, Inc. v. CPSGMHB*, 156 Wn.2d 131, 138 (2005)(Holding neither RCW 36.70A.035 or .140  
require individualized notice but noting that individualized notice may be required to satisfy due process  
requirements if that property owner's land is uniquely target so that their property rights are actually and  
significantly affected).

1 for these compliance proceedings and complied with the spirit of the public participation  
2 program established by the County in SCC 3.30 and SCC 3.31.

3 **Impervious Coverage and Storm Water Discharge**

4 **Petitioners LBN and Jeanie Wagenman:**

5 Petitioners argue the Board “expected that the county would adopt maximum  
6 impervious surfaces and measures to control storm water,” but the County has done  
7 neither.<sup>55</sup> Petitioners contend Stevens County fails to establish storm water and impervious  
8 surface design standards, set appropriate limits, define the terms of those standards, and  
9 set requirements for how to implement and enforce the standards.<sup>56</sup>

10 According to Petitioners, the terminology used by the County is vague, arbitrary, or  
11 simply undefined, leaving varying or unclear interpretations of the code provisions.<sup>57</sup>

12 Petitioners contend development regulations need to have objective, enforceable standards  
13 for development and not language which is left to the interpretation of the Planning  
14 Department.<sup>58</sup>

15 Petitioners further argue the new language does not comply with Best Available  
16 Science (BAS) and cite to various literature as to the impact of impervious surface and  
17 storm water on water quality.<sup>59</sup>

18 **Respondent Stevens County:**

19 \_\_\_\_\_  
20  
21 <sup>55</sup> Petitioners’ Redacted Response Brief, at 5.

22 <sup>56</sup> Petitioners’ Redacted Response Brief, at 5.

23 <sup>57</sup> Petitioners’ Redacted Response Brief, at 5-9.

24 <sup>58</sup> Petitioners’ Redacted Response Brief, at 9.

25 <sup>59</sup> Petitioners’ Redacted Response Brief, at 9-11. The Board notes Petitioners do not attach this literature but  
26 merely state “Petitioners have placed into the record repeatedly many good sources of science” or that “there  
is much science that supports the importance of addressing this issue [which] Petitioners have placed into the  
record.” But, as noted in this Compliance Order, this does not place these documents before the Board in  
these compliance proceedings and it is not the duty of the Board to delve through a previous Record to locate  
Petitioners’ science relevant to the instant matter.

1 Stevens County asserts it has amended the necessary sections of its code to include  
2 requirements "to ensure that the effect of impervious surfaces and storm water are  
3 minimized or adequately mitigated for all proposed subdivisions in the rural zones when  
4 critical areas are present."<sup>60</sup> The County contends the Board's FDO did not require the  
5 establishment of a fixed percentage-based land use restriction.<sup>61</sup>

6 Stevens County concurs it relies, in part, on SEPA and its CAO but contends this is  
7 appropriate so as to evaluate other possible environmental effects. The County states the  
8 SEPA process will provide for not only adequate review of potential impacts but an avenue  
9 of appeal for any aggrieved citizen.<sup>62</sup> Relying on the CAO and SEPA review process, the  
10 County asserts the added provisions incorporate "appropriate standards" such as the need  
11 for a hydrogeologic site evaluation or a threshold determination.<sup>63</sup>

11 **Petitioners Reply:**

12 Petitioners reiterate their claim of vagueness in the amended language, asserting it is  
13 "up to the discretion of the planning director" as to what design standards would minimize  
14 or mitigate the effect of impervious surface and storm water discharge.<sup>64</sup> Petitioners assert  
15 specific controls or requirements is what the development regulations need.

16 Petitioners further contend reliance on SEPA is ineffective due to the exemptions  
17 afforded by SEPA to many development projects as well as the CAO's similar exemptions.  
18 In addition, Petitioners argue the County's CAO does not establish requirements for  
19 minimizing impacts nor do the regulations address off-site or cumulative impacts.<sup>65</sup>  
20

21 **Board Analysis:**  
22

23 <sup>60</sup> County Response Brief, at 5

24 <sup>61</sup> County Response Brief, at 6

25 <sup>62</sup> County Response Brief, at 6-8.

26 <sup>63</sup> County Response Brief, at 6-8.

<sup>64</sup> Petitioners' Reply Brief, at \_\_\_\_

<sup>65</sup> Petitioner's Reply Brief, at 15.

1 As noted *supra*, in the October 2008 FDO, the Board determined because one of SCC  
2 Title 3's stated purposes was to minimize potential adverse environmental impacts, the  
3 County's CAO was not the only regulation which served to protect critical areas but the  
4 development regulations could be utilized to amplify protections by establishing simple  
5 design standards such as limitations on impervious coverage and methods of controlling  
6 storm water discharge as asserted by Petitioners.<sup>66</sup> Specifically, the Board noted the CAO  
7 did not address impervious surface or storm water control, thereby leaving this standard of  
8 protection to other development regulations.<sup>67</sup> As to storm water runoff, the Board  
9 stated:<sup>68</sup>

10 As for the application of storm water discharge controls [with a few  
11 exceptions] the consideration ... is limited to UGAs ... Although the Board  
12 recognizes the method of storm water control within the rural area will differ  
13 from that of the UGA, the consideration of storm water discharge resulting  
14 from a development proposal should, at a minimum, be considered within the  
15 development review process so as to ascertain whether increases in discharge  
16 resulting from the development would adversely impact critical areas.

17 As for impervious surface coverage, the Board stated:<sup>69</sup>

18 Setting limitations for impervious surface within SCC 3.11 Subdivisions and  
19 3.16 Short Subdivision, the design standard sections specifically addressed by  
20 Petitioners, is a nominal and easily accomplished amendment that will serve in  
21 providing protections to the functions and values of critical areas throughout  
22 Stevens County, especially in relationship to CARAs ... the maximum  
23 permissible impervious coverage ... [is] at the County's discretion.

24 The question during these compliance proceedings is whether the provisions added by the  
25 County with the adoption of Ordinance No. 3-2009 adequately address the areas of non-  
26 compliance identified by the Board in the FDO. The County must remember - compliance is  
based not just solely on a finding the County complied with the FDO but that its actions also

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<sup>66</sup> FDO, at 49

<sup>67</sup> FDO, at 50

<sup>68</sup> FDO, at 50-51.

<sup>69</sup> FDO, at 50, 53

1 comply with the GMA.

2       Within Stevens County, critical area review applies to all land use activities. Although  
3 SEPA provides for categorical exemptions, the County's CAO does not – it applies generally  
4 to "all land uses."<sup>70</sup> The CAO does provide for some limited exceptions,<sup>71</sup> but still subjects  
5 single-family residences to critical area review.<sup>72</sup> Thus, although a proposal may be exempt  
6 from SEPA review, with limited exception, land use activities are not exempt from CAO  
7 review.<sup>73</sup> And, CAO review is intended to fulfill the purpose and intent of the CAO, namely  
8 the conservation, protection, and maintenance of the functions and values of the County's  
9 critical areas.<sup>74</sup> Thus, mandating consistency with these regulations is an appropriate first  
10 step for the County.

11       Storm water and impervious surface are two things which are intrinsically linked and  
12 can result in adverse impacts to critical areas. It is well recognized that development of land  
13 can change the hydrologic process with buildings, roads, and parking areas introducing  
14 impervious surfaces which block rainwater infiltration. With less area for infiltration, the  
15 volume of storm water runoff increases and with it pollutants such as sediments, fertilizers,  
16 and other chemicals are introduced into water resources with little chance for filtering of  
17 these pollutants. It is these impacts that are of concern to Petitioners and were in the  
18 forefront of the prior proceeding.

19       In the FDO, the Board stated Stevens County should, at a minimum, consider storm  
20 water discharge resulting from a development proposal during the review process in the  
21 rural areas. The reasoning behind the Board's holding was that although not all

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21 <sup>70</sup> SCC 3.04.020(A); SCC 13.00.030; SCC 13.10.010

22 <sup>71</sup> SCC 13.30.020 General Exemptions (i.e. emergencies, government practices, navigational devices); SCC  
23 13.20.030 Reasonable Use Exceptions (RUEX). The RUEX process does not eliminate review of a proposal's  
24 impacts on a critical area. Rather, it seeks to provide for reasonable use of the property while minimizing and  
25 mitigating impacts; SCC 13.10.046(2) no review within CARAs except for new developments subject to SEPA.

26 <sup>72</sup> SCC 13.30.031(2); SCC 13.10.046(2)

<sup>73</sup> WAC 197-11-908 allows for the County to exempt certain types of categorical exemptions when located  
within critical areas. By doing so, a jurisdiction requires SEPA review regardless of the exemption status of the  
project. Stevens County has not elected to do this.

<sup>74</sup> SCC 13.00.020.

1 developments would result in storm water issues some, like cluster developments, may  
2 necessitate a method of control in order to address increases in discharge resulting from  
3 development that could adversely impact critical areas.<sup>75</sup> Therefore, without some  
4 consideration the level of the impacts would not be known and could not be addressed. As  
5 for impervious coverage, the Board required more than just the consideration of impervious  
6 coverage within the rural area; impervious coverage was to be considered “throughout the  
7 County” given the fact critical areas can occur in both urban and rural areas as does  
8 impervious coverage.<sup>76</sup> In addition, relying on scientific documentation which delineates  
9 impacts based on percentage of coverage, the Board concluded setting a maximum  
10 permissible coverage limitation was an easily accomplished task.<sup>77</sup>

11 Thus, Petitioners are correct in that the Board did expect methods and limitations to  
12 be delineated by the County. However, the Board acknowledges Stevens County does not  
13 have to amend its development regulations to conform to Petitioners’ recommendations nor  
14 is this Board empowered to require the County to adopt specific language *unless* such  
15 language is mandated in order to achieve compliance with the GMA. As such, although the  
16 Board envision methods and limitations, if the County was able to devise a regulation which  
17 would serve the same end result, then this is acceptable under the GMA.

18 As noted in the October 2008 FDO, the GMA requires not only designation of critical  
19 areas but protection of those critical areas based on best available science (BAS).<sup>78</sup>  
20 However, unless a jurisdiction is relying solely on an outside regulation to protect a critical

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21 <sup>75</sup> FDO, at 50-51.

22 <sup>76</sup> FDO, at 61

23 <sup>77</sup> In the Board’s experience, many jurisdictions establish maximum coverage. Most jurisdictions utilize total  
24 percentage of the parcel when establishing the maximum but some vary coverage based on land use  
25 (residential v. industrial), topographical, or environmental features. *See, e.g.* Thurston County – 60%  
26 maximum in Rural 1du/5 acre zone in comparison to 5-60% coverage in McAllister Geologically Sensitive Area  
depending on lot size; Spokane County – 55% maximum in low-density residential, 70% in high-density  
residential; Yakima County – 45% coverage in rural transitional, 90% in industrial; City of Mercer Island –  
40% maximum coverage for slope of less than 15%, 20% for slope of greater than 50%.

<sup>78</sup> October 2008 FDO, at 42.

1 area, only CAOs are required to be based on BAS.<sup>79</sup> Here, Stevens County is not relying on  
2 Title 3 for the protection of its critical areas; a fact which was noted by the Board in the  
3 FDO. Rather, with Title 3, Stevens County is amplifying protection and the Board finds  
4 nothing in the GMA which mandates the use of BAS when drafting these types of  
5 regulations, although reference to BAS would undoubtedly provide assistance in the  
6 process.

7 In regards to impervious surface, many studies were made available for the County's  
8 review, which specifically equate percentage of coverage with impact of development on  
9 water resources.<sup>80</sup> The County, relying on *Citizens Alliance for Property Rights v. Sims*,  
10 asserts the establishment of a fixed percentage-based restriction is unlawful.<sup>81</sup> The County  
11 misreads the case; although the Court did hold the fixed percentage clearing and grading  
12 limitations were not proper, it did so because King County established a uniform  
13 requirement for a cleared area on each lot unrelated to any evaluation of the demonstrated  
14 impact of proposed development.<sup>82</sup> In coming to this conclusion, the Court noted the  
15 necessary relationship may be demonstrated by studies which show a connection exists  
16 between the impact of proposed development and an ordinance's requirement.<sup>83</sup> Thus,  
17 nothing precludes Stevens County from adopting a fixed percentage it so chooses;  
18 something it did not do at this time.

19 The language the County did adopt for impervious surfaces gives no guidance or  
20 consideration as to maximum coverage or how lot design/layout would reduce any impacts.

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21 <sup>79</sup> For example, if Stevens County's CAO referenced its storm water regulations and contended critical area  
22 protection was being achieved through compliance with the standards of that regulation, then those  
23 regulations are required to be based on BAS.

24 <sup>80</sup> Petitioners' Attachment No. 8 – "Impervious coverage, then, is both a reliable and integrative indicator of  
25 the impact of development on water resources."

26 <sup>81</sup> Respondent's Response, at 6 (citing to *Citizens Alliance for Property Rights v. Sims*, 145 Wn. App. 649  
(2008, Division I), *reviewed denied*, Supreme Court Docket No. 82106-2 (March 3, 2009)). The Board notes  
that although persuasive argument, a holding from Division I Court of Appeals is not binding in Eastern  
Washington.

<sup>82</sup> King County's ordinance established clearing limits based on parcel size. The flaw in King County's  
ordinance was that the limitations were applicable no matter what type of development was being proposed –  
whether it is a 1,000 square foot garage or a 5,000 square foot house – the same limitations applied.

<sup>83</sup> Citing to the Supreme Court's holding in *Trimen Development v. King County*, 124 Wn.2d 261 (1994)

1 In addition, this language is limited to the rural areas and fails to address similar situations  
2 in urban areas. The language adopted by the County does provide for the consideration of  
3 storm water discharge in the rural areas of the County. This, at the minimum, was what the  
4 Board wanted. However, in both situations, there are no defined standards to guide  
5 decision-makers except to note that lot design is to minimize the effect consistent with the  
6 CAO and SEPA regulations.

7 The Board recognizes the need to have development regulations which provide for  
8 clear, specific standards so as to prevent arbitrary and discretionary application. In this  
9 regard, the courts have noted that without such standards it is hard for anyone to judge  
10 whether the decision is reasonable and, therefore, the burden is on the decision-making  
11 body to justify its decision without the usual presumption of validity or reasonableness  
12 being afforded.<sup>84</sup> Under the County's approach, the Planning Director shoulders a heavy  
13 burden. The new language does not establish technical design standards, maximum  
14 coverage limitations, or best management practices nor does it provide for guidance from  
15 the Department of Ecology's *Stormwater Manual for Eastern Washington* as SCC 3.11 and  
16 SCC 3.16 does for subdivisions and short subdivisions within urban areas.<sup>85</sup> In other words,  
17 the County fails to denote the methods by which storm water issues will be considered or  
18 any measure by which impervious coverage could be addressed. Rather, the County  
19 addresses the effects of these impacts on lot design, apparently contending that adjusting  
20 the layout of a subdivision would mitigate and minimize the effect. The Board fails to see  
21 how adjusting the layout of a subdivision addresses total impervious coverage of the site or  
22 controls storm water runoff. The mystery of how the "effects" would be minimized is what  
23 creates a regulation which fails to comply with the GMA.

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23 <sup>84</sup> See e.g. *Sunderland Trust v. Pasco*, 127 Wn.2d 782, 797 (1995)(Noting that Washington has adopted a  
24 minority position which does not require specific only general standards but, this requires justification by the  
25 decision-maker).

25 <sup>85</sup> SCC 3.11.236(E), 3.16.236(F). Both of these SCC provisions require the provision for "storm water  
26 management consistent with SCC 3.04.020." SCC 3.04.020(D) states that the Eastern Washington  
Stormwater Manual is to be used as guidance when developing storm water plans..

1 As noted *supra*, the relevant standard under the GMA is for the functions and values  
2 of critical areas are to be *protected with further degradation of the area being prevented*.  
3 Requiring lot design to *minimizing the effect* does not ensure existing functions and values  
4 are protected and maintained. The GMA requires the County to enact development  
5 language which *protect* critical areas from adverse impacts, not *minimize* the effect of those  
6 impacts.

6 **Conclusion:**

7 The Board finds and concludes the provisions adopted by Stevens County in  
8 Ordinance 3-2009 do not adequately address the areas of non-compliance identified by the  
9 Board in the October 2008 FDO. Although the County has required the consideration of two  
10 development-related impacts which can result in adverse impacts to designated critical  
11 areas, it has failed to adopted regulations which satisfy the GMA's requirements to protect  
12 the functions and values of critical areas as provided in RCW 36.70A.020(10), RCW  
13 36.70A.060(2), and RCW 36.70A.172.

14 **VII. FINDINGS OF FACT and CONCLUSIONS OF LAW**

- 15 1. Stevens County is a county located east of the crest of the Cascade  
16 Mountains and opted to plan under the GMA and is therefore required  
to plan pursuant to RCW 36.70A.040.
- 17 2. On October 6, 2008, the Board issued is Final Decision and Order  
18 (FDO) in the matter of *Larson Beach Neighbors/Wagenman v. Stevens  
County*, Case No. 07-1-0013.
- 19 3. This Board has continuing jurisdiction over the parties and subject  
20 matter of this compliance action.
- 21 4. In the October 2008 FDO, the Board determined Stevens County failed  
22 to consider two development-related impacts – impervious coverage  
23 and storm water discharge – in regards to their effect of critical areas,  
24 specifically as to Stevens County Code (SCC) 3.11 and 3.16.  
25 Therefore, the Board determined the County was not in compliance  
26 with the GMA – RCW 36.70A.020(9), .020(10), .060, and .172 – and  
remanded the matter to the County to take legislative action.

- 1           5.     On February 2, 2009, the County adopted Ordinance 3-2009 in  
2           response to the Board's FDO.
- 3           6.     SCC 3.31.070 permits deviation from Stevens County's adopted public  
4           participation program in emergency situations. Ordinance 3-2009  
5           noted that it was being adopted pursuant to SCC 3.31.070.
- 6           7.     Use of the provisions of SCC 3.31.070 is limited to comprehensive  
7           plans, moratorium, or interim regulations. None of these are present in  
8           the instant matter and, therefore, Stevens County's reliance on this  
9           provision of its code was not proper.
- 10          8.     RCW 36.70A.140 and SCC 3.31.040(G) permit deviation from Steven  
11          County's adopted public participation program when responding to an  
12          order of the Board. Public participation must be appropriate and  
13          effective under the circumstances.
- 14          9.     During the adoption of Ordinance 3-2009, the County held one public  
15          hearing before the Board of County Commissioners with opportunity for  
16          the public to submit comments prior to the hearing and offer testimony  
17          during the hearing. Notice of this hearing was published once in the  
18          *Chewelah Independent*, posted on the County's Land Use Services  
19          Department website, and mailed to agencies and interested parties,  
20          including the Petitioners. Notice was provided at least 10 days prior to  
21          the hearing.
- 22          10.    Notice of the matter satisfies the County's notice provisions for Type 5  
23          Proposals as set forth in SCC 3.30.120 and 3.30.125 and the GMA, RCW  
24          36.70A.035.
- 25          11.    Steven County did not hold a public meeting in any Commissioner's  
26          district, as provided by SCC 3.31.040(B), nor did it hold a public hearing  
            before the Planning Commission, as required by SCC 3.31.050(B).
12.    SCC 3.31.040(B) does not require a public meeting. Omission of a  
            public hearing before the Planning Commission, under the  
            circumstances of these compliance proceedings, did not preclude  
            appropriate and effective public participation.
13.    Petitioners fail to demonstrate, given RCW 36.70A.140 and SCC  
            3.31.040(G), both of which permit deviation from an established public

1 participation process during compliance proceedings if appropriate and  
2 effective public participation is afforded, Stevens County failed to  
3 provide such public participation.

4 14. The October 2008 FDO required the County to consider the effects of  
5 impervious surface coverage and storm water discharge on critical  
6 areas throughout the County.

7 15. With Ordinance 3-2009, the County amended SCC, Title 3, to include  
8 the consideration of impervious surface and storm water during  
9 subdivision and short subdivision review within rural areas.

10 16. The amendatory language requires lot design to minimize the effects of  
11 impervious surface coverage and storm water discharge when critical  
12 areas are present.

13 17. The amendatory language requires consistency with the County's  
14 Critical Areas Ordinance, Title 13, and SEPA procedures, SCC 3.80.

15 18. The amendatory language does not provide specific design standards  
16 or methods of controls. No guidance is given to suggest how lot design  
17 or lot layout will reduce impacts to critical areas.

18 19. Scientific literature demonstrates the relationship between increased  
19 impervious coverage, storm water flow, and critical areas impacts.

20 20. The amendatory language, in regards to impervious surface, is limited  
21 to rural areas and does not address urban areas.

22 21. The GMA requires protection of the functions and values of critical  
23 areas through RCW 36.70A.020(9), .020(10), .060(2), .170, and .172.

24 22. Washington State Law does not preclude the establishment of a fixed  
25 percentage-based restriction so long as that restriction is related to the  
26 impacts of the proposed development.

23 23. The GMA requires protection of critical areas from further degradation,  
24 not the minimization of impacts.

25 24. The Petitioners have demonstrated Stevens County failed to comply  
26 with the Board's October 2008 FDO and the FDO, specifically RCW

1 36.70A.020(10), .060(2), and .172, by failing to enact development  
2 regulations which ensure the functions and values of the County's  
3 designated critical areas are protected from further degradation.

### 4 IX. ORDER

5 Based upon review of the briefs and exhibits submitted by the parties, the GMA, prior  
6 Board Orders, including the October 2008 FDO in this matter, and case law, having  
7 considered the arguments of the parties, and having deliberated on the matter the Board  
8 ORDERS:

- 9 1. Stevens County has failed to enact legislation which complies with the  
10 Growth Management Act's requirements to protect the functions and  
11 values of critical areas as set forth in RCW 36.70A.020(10), .060(2),  
12 and 172.
- 13 2. Ordinance No. 3-2009 is remanded to Stevens County for the County  
14 to take legislative action to achieve compliance with the Growth  
15 Management Act pursuant to this decision no later than **August 14,**  
16 **2009, 120 days** from the date issued. The following schedule for  
17 compliance, briefing and hearing shall apply:
- 18 • The County shall file with the Board by **August 24, 2009, an original**  
19 **and four copies** of a **Statement of Actions Taken to Comply**  
20 **(SATC)** with the GMA, as interpreted and set forth in this Order. The  
21 SATC shall attach copies of legislation enacted in order to comply. The  
22 County shall simultaneously serve a copy of the SATC, with  
23 attachments, on the parties. **By this same date, the County shall**  
24 **file a "Remanded Index," listing the procedures and materials**  
25 **considered in taking the remand action.**
  - 26 • By no later than **September 8, 2009<sup>86</sup>**, Petitioners shall file with the  
Board an **original and four copies** of their Comments and legal  
arguments (Petitioners' Compliance Brief) on the County's SATC.

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<sup>86</sup> \_\_\_\_\_, is also the deadline for a person to file a request to participate as a "participant" in the compliance proceeding. See RCW 36.70A.330(2).

1 Petitioners shall simultaneously serve a copy of their Comments and  
2 legal arguments on the parties.

- 3 • By no later than **September 22, 2009**, the County shall file with the  
4 Board an **original and four copies** of their Response to Comments  
5 and legal arguments (Respondent's Compliance Brief.) The County shall  
6 simultaneously serve a copy of such on the parties.
- 7 • The parties are requested to file their briefing electronically to the  
8 Board and opposing counsel on the date(s) indicated above in the  
9 compliance schedule.
- 10 • Pursuant to RCW 36.70A.330(1) and WAC 242-02-891<sup>87</sup> the Board  
11 hereby schedules a **telephonic Compliance Hearing for**  
12 **September 29, 2009, from 10:00 a.m. to 12:00 p.m. The**  
13 **compliance hearing shall be limited to consideration of the**  
14 **Legal Issues found noncompliant and remanded in this FDO.**  
15 The parties will call **360-407-3780 followed by 241772 and the #**  
16 **sign.** Ports are reserved for: **Ms. Wagenman and Mr. Scott.** If  
17 additional ports are needed please contact the Board to make  
18 arrangements.

19 If the County takes legislative compliance actions prior to the date set forth in  
20 this Order, it may file a motion with the Board requesting an adjustment to this  
21 compliance schedule.

22 **Pursuant to RCW 36.70A.300 this is a final order of the Board.**

23 **Reconsideration:**

24 Pursuant to WAC 242-02-832, you have ten (10) days from the mailing of this  
25 Order to file a petition for reconsideration. Petitions for reconsideration shall  
26 follow the format set out in WAC 242-02-832. The original and four (4) copies of  
the petition for reconsideration, together with any argument in support thereof,  
should be filed by mailing, faxing or delivering the document directly to the  
Board, with a copy to all other parties of record and their representatives. **Filing**  
**means actual receipt of the document at the Board office.** RCW 34.05.010(6),

<sup>87</sup> The Presiding Officer may issue an additional notice after receipt of the SATC to set the format and  
additional procedures for the compliance hearing.

1 WAC 242-02-330. The filing of a petition for reconsideration is not a prerequisite  
2 for filing a petition for judicial review.

3 **Judicial Review:**

4 Any party aggrieved by a final decision of the Board may appeal the decision to  
5 superior court as provided by RCW 36.70A.300(5). Proceedings for judicial  
6 review may be instituted by filing a petition in superior court according to the  
7 procedures specified in chapter 34.05 RCW, Part V, Judicial Review and Civil.

7 **Enforcement:**

8 The petition for judicial review of this Order shall be filed with the appropriate  
9 court and served on the Board, the Office of the Attorney General, and all parties  
10 within thirty days after service of the final order, as provided in RCW 34.05.542.  
11 Service on the Board may be accomplished in person or by mail. Service on the  
12 Board means actual receipt of the document at the Board office within thirty  
13 days after service of the final order.

13 **Service:**

14 This Order was served on you the day it was deposited in the United States mail.

15 RCW 34.05.010(19)

16 SO ORDERED this 16<sup>th</sup> day of April 2009.

17 EASTERN WASHINGTON GROWTH MANAGEMENT  
18 HEARINGS BOARD

19 \_\_\_\_\_  
20 Joyce Mulliken, Board Member

21 \_\_\_\_\_  
22 John Roskelley, Board Member

23 \_\_\_\_\_  
24 Raymond L. Paoella, Board Member